OGDEN NEWELL & WELCH PLLC
ATTORNEYS FOR BUSINESS

1700 PNC PLAZA
500 WEST JEFFERSON STREET
LOUISVILLE, KENTUCKY 40202-2874
(502) 582-1601
FAX (502) 581-9564
www.ogdenlaw.com

J. GREGORY CORNETT

DIRECT DIAL (502) 560-4210
DIRECT FAX (502) 627-8710

gcornett@ogdenlaw.com

December 3, 2003

VIA HAND DELIVERY
Mr. Thomas M. Dorman
Executive Director
Public Service Commission
211 Sower Boulevard
Frankfort, Kentucky 40602

RE: ***In the Matter of: Petition of CTA Acoustics, Inc. to Retain Kentucky Utilities Company as Power Supplier***
KPSC Case No. 2003-00226
ON&W File No. 1/305

Dear Mr. Dorman:

Enclosed please find and accept for filing the original and ten (10) copies of Kentucky Utilities Company's Objection to Motion of Cumberland Valley Electric, Inc. to Dismiss Petition or For Summary Judgment in the above-referenced matter. Please confirm your receipt of this filing by placing the stamp of your Office with the date received on the enclosed additional copy and return it to me in the enclosed self-addressed stamped envelope.

Should you have any questions or need any additional information, please contact me at your convenience.

Yours very truly,

J. Gregory Cornett

JGC/ec
Enclosures
cc: Parties of Record (w/ encl.)
Linda S. Portasik, Esq. (w/ encl.)

292024.01

RECEIVED
DEC 0 3 2003
PUBLIC SERVICE COMMISSION

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

PETITION OF CTA ACOUSTICS, INC.	)	
TO RETAIN KENTUCKY UTILITIES	)	**CASE NO. 2003-00226**
COMPANY AS POWER SUPPLIER	)	
AND FOR EXPEDITED TREATMENT	)	

OBJECTION OF KENTUCKY UTILITIES COMPANY TO MOTION OF CUMBERLAND VALLEY ELECTRIC, INC. TO DISMISS PETITION OR FOR SUMMARY JUDGMENT

Cumberland Valley Electric, Inc. ("CVE") has moved to dismiss the Petition of CTA Acoustics, Inc. ("CTA"), arguing that CTA lacks standing to bring that Petition before this Commission. Alternatively, CVE has moved for summary judgment, arguing that there is no legal basis for granting the relief requested in CTA's Petition. For all of the reasons set forth below, those motions are both without merit, and Kentucky Utilities Company ("KU") respectfully requests that both motions be denied.

I. CVE's Motion to Dismiss is Without Merit.

CVE first seeks to dismiss the Petition in this action for lack of standing. CVE argues that CTA has no right to seek a ruling in this case because CTA does not own the Southeast Kentucky Regional Business Park ("Business Park" or "Park"). That argument, however, erroneously applies the law and ignores key facts.

CVE cites the case of Associated Industries of Ky. v. Commonwealth of Kentucky, Ky., 912 S.W.2d 947 (1995), for the proposition that a litigant may not seek relief based on the rights of a third party. That case, however, is in the context of civil

litigation regarding constitutional rights, and has absolutely no application to this statutory-based administrative proceeding. This action is brought pursuant to, and is governed by, KRS 278.018(1), which provides:

> In the event that a new electric-consuming facility should locate in two (2) or more adjacent certified territories, the commission **shall** determine which retail electric supplier shall serve said facility based on criteria in KRS 278.017(3).

(Emphasis added.) Although that statute, which is ignored in CVE's motion, does not expressly address the issue of who may petition the Commission for relief, it is certainly broad enough to confer standing on CTA in this case.

It is well-settled that the statutes of the Commonwealth must "be liberally construed with a view to promote their objects and carry out the intent of the legislature." KRS 446.080. Here, the purpose of the Certified Territories Act is "to encourage the orderly development of retail electric service, to avoid wasteful duplication of distribution facilities, to avoid unnecessary encumbering of the landscape of the Commonwealth of Kentucky, to prevent the waste of materials and natural resources, for the public convenience and necessity and to minimize disputes between retail electric suppliers which may result in inconvenience, diminished efficiency and higher costs in serving the consumer."

Given the broad purpose behind the Certified Territories Act, and the statutory language mandating a decision by the Commission any time "a new electric-consuming facility ... locate[s] in two (2) or more adjacent service territories," it is only reasonable to conclude that a party, such as CTA, locating on a parcel of land which is part of a larger business park is sufficiently connected to that park that it can seek a ruling on

service pursuant to KRS 278.018(1). Such a conclusion is wholly consistent with the decision in In the Matter of: Richmond-Madison Co. Industrial Corp. and the City of Richmond vs. Kentucky Utilities Co. and Blue Grass Rural Elec. Coop., Case No. 95-019 (Order of March 24, 1995), where the Commission took a liberal approach to standing in another case involving the determination of whether an entire business park was a single electric-consuming facility. In Richmond-Madison Co., the Commission considered a motion to dismiss a proceeding on grounds that the Richmond-Madison Co. Industrial Corp. and the City of Richmond (collectively referred to as "Richmond"), who did not own the property which was being developed into an industrial park, lacked standing to seek a ruling on service rights to that park. The Commission denied the motion to dismiss, finding that Richmond's option to purchase the park property was sufficient to confer standing on Richmond to seek a ruling on service rights to the park pursuant to KRS 278.018(1).

It is clear, therefore, that under KRS 278.018(1), as drafted and enacted by the General Assembly, and as previously applied by the Commission, CTA has standing in this proceeding. For that reason, CVE's motion to dismiss must be denied.

Even assuming, however, for the sake of argument only, that CTA itself does not have standing in this proceeding, CVE's motion to dismiss must still be denied because the Southeast Kentucky Industrial Development Authority (the "Authority"), as the owner and developer of the Business Park, has standing. If, as the Commission ruled in Richmond-Madison Co., a *prospective* owner of property to be developed into an industrial park, then it necessarily follows, and cannot be disputed, that the present owner

and developer of a new business park, like the Authority here, also has standing to seek the Commission's ruling on service rights to that park.

Although the Authority did not file the petition which initiated this proceeding, it has, through its authorized representative, Robert S. Terrell, made clear its support of that petition. Specifically, Mr. Terrell has stated in his pre-filed direct testimony that the Authority "endorse[s] CTA's request" to alter the territorial boundary, that it is "concerned that companies coming into our business park would have to be serviced by two different electric suppliers," that it "would make it less complicated to have one electric supplier for the park," and that "KU appears to be in the best position" to serve the entire Park. (Testimony of Robert S. Terrell, August 5, 2003, pp. 3, 5.)

The Authority, like CTA, is clearly interested in having the Commission rule on the question of whether the Business Park should be considered a single electric-consuming facility to be served by one utility. And, as the owner and developer of the Park, the Authority unquestionably has standing to request such a ruling. For that additional reason, CVE's motion to dismiss must be denied.

II. CVE's Motion for Summary Judgment is Without Merit.

CVE alternatively moves for judgment in its favor as a matter of law, arguing that there is no basis in law for the Commission to find that the Park is a single electric-consuming facility. In making that motion, CVE again erroneously applies the law and ignores key facts.

CVE correctly points out that a number of factors have been considered by the Commission in resolving past cases involving the issue of whether a business park should be considered a single electric-consuming facility. Those factors have not, however,

been applied in a strict cookbook fashion as advocated by CVE. Instead, the Commission has considered each case "on its own facts," applying and weighing the various criteria differently in each case. Richmond-Madison Co., p. 3 (Order of March 24, 1995). And, most importantly, those factors have been, and must always be, applied against the backdrop of KRS 278.016, quoted above, which sets out the purpose of the Certified Territories Act.

Because proceedings such as this are inherently fact-specific, resolution before a hearing is not generally appropriate. In fact, in Richmond-Madison Co., the Commission rejected an effort to dismiss the proceeding as a matter of law, holding that "whether the proposed industrial park is a new electric-consuming facility is a question of fact to be determined by the Commission at the conclusion of this proceeding...." Richmond-Madison Co., p. 3 (Order of March 24, 1995). Similarly, in his concurring opinion in the Commission's November 13, 2003 Order in this case, Chairman Huelsmann stated that the Commission would not rule on the issue of whether the Business Park should be considered a single electric-consuming facility "until after the evidentiary record is fully developed and a hearing is held."

CTA, KU and the Authority have presented testimony and documentary evidence establishing that the Business Park is indeed a new, single electric-consuming facility, and that awarding KU the right to serve the entire Park would further the General Assembly's intent, as set forth in KRS 278.016, by allowing orderly development of service within the Park from nearby existing lines, avoiding wasteful duplication of facilities and unnecessary encumbering of the landscape, preventing waste of materials and natural resources, furthering the public convenience and necessity, and avoiding

further disputes regarding service rights within the Park. However, CVE has presented its own evidence (albeit weak evidence) in an attempt to contradict the other proof in this proceeding. There are multiple disputes between the parties concerning key facts in this case, and concerning the application of the relevant factors and policy considerations, and those disputes can only be resolved after a full hearing. Accordingly, CVE's motion for summary judgment must be denied.

CONCLUSION

For all of the reasons set forth above, CVE's motions to dismiss and for summary judgment are without any merit and should both be denied.

J. Gregory Cornett
OGDEN NEWELL & WELCH PLLC
1700 PNC Plaza
500 W. Jefferson Street
Louisville, KY 40202
(502) 582-1601

Linda S. Portasik
LG&E Energy Corporation
220 East Main St.
Louisville, KY 40202

Counsel for Kentucky Utilities Company

CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing was served, via U.S. Mail, postage prepaid, this 3rd day of December 2003, upon the following:

C. Kent Hatfield, Esq.
Stoll Keenon & Park
2650 Aegon Center
400 W. Main St.
Louisville, KY 40202

James Tomaw, Esq.
Tomaw Law Office, LLC
606 Master Street
Corbin, Kentucky 40701

Anthony G. Martin, Esq.
PO Box 1812
Lexington, KY 40588-1812

Ted Hampton
Manager
Cumberland Valley Electric, Inc.
PO Box 440
Gray, KY 40734

R.S. Terrell
Corbin Office of Economic Development
101 North Depot Street
Corbin, Kentucky 40701

Counsel for Kentucky Utilities Co.